MOHD SAAD MAT

v.

AHMAD MUJIBUDIN MOHD SHARIFF

HIGH COURT MALAYA, ALOR SETAR
HISHAMUDIN YUNUS J
[CIVIL APPEAL NO: 12-27-97]
20 DECEMBER 2000

TORT: *Negligence - Road accident - Liability - Whether finding of full liability justified - Quantum - Fracturing and shortening of tibia - Duty to mitigate - Whether discharged - Whether award to be reduced - Medical expenses - Whether to be granted - Loss of earnings - Whether there was evidence of employment and earnings - Whether award to be set aside*

The respondent was a pillion rider on a motorcycle which was involved in an accident with a car driven by the appellant. When the matter came before the sessions judge, it was held that the appellant was fully liable and the respondent was accordingly awarded special and general damages. This was an appeal by the appellant against the said decision.

Held:

[1] The sessions judge did not attach sufficient regard to the weight of evidence before him. The respondent had not proved his case on a balance of probabilities. (p 325 e)

[2] The respondent had admitted that he did not know how the accident occurred. His case relied upon the evidence of the motor cycle rider ("PW2"). However, there were material contradictions in PW2's statement to the police and during his testimony in court. No attempts were made by PW2 to explain these contradictions.
(pp 325 f & 326 b)

[3] The sessions judge did not touch on the inconsistent evidence given regarding the point of impact of the vehicles and his finding was contrary to the evidence adduced. (p 327 e-g)

[4] In absence of a proper analysis, the sessions judge did not deal adequately with the appellant's evidence. There was corroboration of his testimony in the form of the police report. There were no contradictions and his version of how the accident took place appeared reasonable.
(p 328 b)

[5] The appeal against quantum was allowed but confined to the fracture of tibia and 2cm shortening, medical expenses and loss of earning for two years. (p 329 b-c)

[5a] Regarding the fractured tibia and shortening, no reason was given for awarding the respondent RM20,000. The respondent is legally obliged to mitigate his damages. Here, he had refused treatment at the hospital and discharged himself. He then delayed seeking treatment. Evidence proved that the shortening could have been avoided or minimised if he had the recommended operation. Thus, the award was reduced to RM17,000. (pp 329 d-i & 330 a)

[5b] The award for the medical expenses was set aside. Based on the principle of mitigation of damages and subject to the 'one-third' rule, the plaintiff should not be entitled to claim for expenses incurred at a private hospital when he had acted against the doctor's advice of discharging himself and delayed treatment which resulted in the deterioration of his injuries. (p 330 f)

[5c] The award for loss of earnings was set aside as the respondent was vague about the work he allegedly did. There was no evidence in the form of an employment contract or pay slips to prove his earnings at the relevant period. The sessions judge did not explain how he arrived at the two-year period in making his award. (p 331 a-g)

[Appeal against liability allowed with costs; appeal against quantum partially allowed.]

Case(s) referred to:

Chong Kam Siong v. Herman Baharuddin [1995] 2 CLJ 413 ***(refd)***

Goh Ah Ba v. Mohd Zain Sudin [1986] 2 CLJ 282; [1986] CLJ (Rep) 139 ***(refd)***

Harcharan Singh Saudagar Singh v. Hassan Ariffin [1990] 2 CLJ 393; [1990] 2 CLJ (Rep) 99 ***(foll)***

Shuib Awang v. Abdul Manan Abdul Latif [1992] 3 CLJ 1558; [1992] 1 CLJ (Rep) 623 ***(dist)***

For the appellant - Nathan; M/s AJ Teoh & Co
For the respondent - Julbahari; M/s NM Tiong

Reported by M Maheswaran

JUDGMENT

Hishamudin Yunus J:

This is an appeal against the decision of 2 July 1997 of the learned sessions court judge, Alor Setar, in a running down matter. At the conclusion of the hearing of the civil action, the learned sessions court judge gave judgment in

favour of the plaintiff (the respondent in the present appeal). The dissatisfied defendant appealed, and is now the appellant in the present case.

On the night of 14 March 1994, a road accident occurred along a road in the town of Jitra involving a motorcycle ridden by one Afizi bin Abdul Aziz (PW2) and a car driven by the defendant. The plaintiff was a pillion rider on the motorcycle. The plaintiff and PW2 were travelling from Jitra town towards the direction of Alor Setar, while the defendant, also travelling on the same road, was from the opposite direction. The two vehicles collided. Both the plaintiff and the rider of the motorcycle suffered physical injuries.

The plaintiff (that is, the pillion rider), who suffered serious injuries, sued the defendant for negligence. The learned Sessions Court judge found the defendant liable in negligence and awarded the plaintiff special and general damages.

The appeal by the defendant is against both liability and quantum.

I have allowed the appeal against liability, and I have also allowed but partially the appeal against quantum. I shall now state my grounds.

On Liability

In my opinion, the finding of the learned sessions court judge that the defendant was guilty of negligence was against the weight of evidence. It is my view that, on the evidence taken as a whole, the plaintiff had not succeeded in proving his case on a balance of probabilities. My judgment is based on the following considerations.

First, the plaintiff himself had admitted in cross examination that he was a pillion rider and did not know how the accident occurred. He said:

> Saya tidak tahu bagaimana kemalangan ini berlaku.

Second, the plaintiff was mainly relying on the evidence of the motorcyclist, PW2; but the credibility of PW2 is highly suspect. I detect two serious contradictions in his testimony. The first contradiction is this.

This witness said in cross examination that he did not see the defendant's car. He said:

> Saya rasa motokar itu datang daripada Alor Setar ke Jitra. Saya tak nampak kereta sebelum kemalangan.

In his evidence during examination-in-chief and in his police report, however, he did not say that he did not see the car before the accident. On the contrary, in his police report he clearly said:

> ... tiba-tiba sebuah motokar **dari arah hadapan** telah bergesel bahagian handle motosikal saya. [Emphasis added.]

And in evidence during examination-in-chief he again said:

> Kereta datang daripada Alor Setar ke Jitra (arah bertentangan).

From the above report and evidence in examination-in-chief, PW2 seemed to know from which direction the car came. This implies that he did see the defendant's car before the accident. Thus we have a situation where the witness, in his evidence during cross-examination in court, had contradicted what he had said earlier during examination-in-chief and in his police report. No attempt was made by the witness to explain this contradiction.

But besides this contradiction, there is another unsatisfactory aspect of the evidence. When PW2 said that he did not see the defendant's car, the implication is this: it is either he was not telling the truth in court or he was, that night, not paying attention to oncoming traffic, in which case he had not been riding his motorcycle with due care and attention. I am inclined to think that the former is the case because, in the absence of a satisfactory explanation as to how he did not see the defendant's oncoming car, it is difficult to accept PW2's claim that he did not see the vehicle.

I shall now move on to the next contradiction. This contradiction is between what PW2 had said in his police report and what he subsequently said in evidence in court. In his police report, this witness had stated that the defendant's car grazed his motorcycle. He said:

> ... tiba-tiba sebuah motokar dari arah hadapan telah **bergesel** bahagian handle motosikal saya. [Emphasis added.]

And in cross-examination he said:

> Motokar langgar bahagian kanan (kereta itu tergesel motorsikal). Apabila tergesel motorsikal pergi ke kiri dan saya jatuh ke kiri dan motorsikal jatuh dalam 1 meter jauhnya daripada saya.

But the evidence of the investigating officer, PW1, regarding the damage to both vehicles, contradicts the above evidence. For the evidence of PW1 shows that it was not a mere case of one vehicle grazing (tergesel) another vehicle. The accident was more serious that that. There was, in fact, an impact, a collision (although not a head-on) between the two vehicles, resulting in damage to the front bumper and bursting of the front offside tyre of defendant's car, and resulting in serious injuries to the pillion rider (the plaintiff). There was also some damage to the motorcycle handle (right side) front headlight and front signal light (right side). A mere grazing would not result in such damage or injuries.

Third, there is no evidence such as glass splinters or brake or skid or scratch marks on the road to indicate that the collision took place on the plaintiff's side of the road. It is true that the sketch plan shows that the plaintiff's motorcycle was found lying on the plaintiff's lane (ie, on the plaintiff's side of the road). But this is just a factor and I do not think that it is a strong factor or a conclusive indication of the point of impact because, by reason of the law of physics, a motorcycle does not normally fall and settle exactly at the point of collision. On the contrary, the position of the motorcycle seems to counter PW2's version as to how the accident occurred. PW2 said in cross-examination:

> Apabila saya nampak serpihan kaca saya perlahankan motorsikal saya. Pada masa itu saya berada di bahagian kiri di tengah jalan. Di tengah jalan bahagian saya. Motokar langgar bahagian kanan (kereta itu tergesel motorsikal). Apabila tergesel motorsikal pergi ke kiri dan saya jatuh ke kiri dan motorsikal jatuh dalam 1 meter jauhnya daripada saya.

Now, if as claimed by PW2 that he was, just prior to the accident, riding in the centre of his lane and that as a result of the grazing the motorcycle swerved to the left, then the motorcycle, after the accident, would not have been in the position as shown in the sketch plan. That is to say, the motorcycle would not still be on the centre of PW2's lane, less still on the right side of PW2's lane: the motorcycle would have been much on the left side of PW2's lane. But the sketch plan shows the opposite: the plan shows the motorcycle lying on the right side of PW2's lane.

The learned sessions court judge, in his grounds, did not touch on this inconsistency. Instead, in his grounds of judgement, he states:

> Kesan-kesan perlanggaran juga terdapat di laluan sah SP2.

With respect, the learned sessions court judge does not state in his grounds what the marks (kesan-kesan) are. But be that as it may, this finding of his is contrary to the evidence adduced. For the investigating officer, PW1, had said in cross-examination.

> Dalam kemalangan ini saya tak jumpa kesan serpihan kaca. Tiada kesan-kesan yang lain.

And in re-examination he said:

> saya tak pasti kesan kaca lampu motorsikal dan lampu signal motorsikal.

It is, however, true that the sketch plan shows some glass splinters (marked "G") on the plaintiff's side of the road. But PW1 had explained that the glass splinters marked "G" had nothing to do with the accident involving the appellant and the defendant. He said the glass splinters came from the vehicles involved in an earlier accident.

Finally, there is, in my view, the credible evidence of the defendant, which must be taken into account. The defendant said that on that night he was driving from Tanah Merah to Jitra. He said that his car was about two feet away from the centre white line. He said he saw the motorcycle driven by PW2 overtaking another motorcycle and in so doing had encroached into his side of the road. While encroaching, the leg of the pillion rider of the motorcycle hit his front offside headlamp. The collision caused some damage to his car. His evidence was corroborated by his police report. Compared to the evidence of PW2 the defendant's evidence was not contradictory in nature, and his version as to how the accident occurred appears reasonable.

With respect, the learned sessions court judge did not deal adequately with the defendant's evidence. After summarising the defendant's evidence, he merely states in his grounds of judgment the following:

> Setelah mendengar keterangan kedua-dua pihak hujjah peguam-peguam dan meneliti dokumen dan rajah kasar saya berpendapat versi SP2 adalah lebih munasabah berbanding versi Defendan.

There is no analysis at all of the defendant's evidence.

Based on above reasoning I had allowed the appeal on liability with costs.

Before I move on to quantum, I wish to refer to the notice of appeal to the Court of Appeal dated 28 November 2000 filed by the plaintiff/respondent (who would be the appellant before the Court of Appeal). I am rather perturbed to note para. 2 of the notice that states:

> ... Pihak Penentang [plaintiff] (perayu tersebut di atas) di dapati 100% salah dari segi liabiliti [oleh Hakim Mahkamah Tinggi] dan dari segi kuantum award Hakim Mahkamah Sesyen ... .

I must register here that the above statement of the respondent/plaintiff in his notice of appeal is wholly incorrect. This part of the statement does not reflect the decision that I have made. I had made no finding regarding the liability of the plaintiff. As can be seen from the notes of the proceeding before me, I merely allowed the appeal by the defendant on liability with costs. I was only concerned with the liability of the defendant. I made no ruling as regards the liability of any other party in the proceeding. Indeed, in view of the nature of the proceeding (there was no counterclaim by the defendant or cross-appeal by the plaintiff) and the issues before me it would be inappropriate for me to make such a ruling. When I made the decision on the issue of liability, I was merely of the view that on the totality of the evidence the plaintiff had failed to make out a case against the defendant. The question as to whether or not the plaintiff was guilty of negligence did not arise at all.

On quantum

As I have already, on the issue of liability, held that the defendant was not liable in negligence, strictly, it was not necessary for me to consider the appeal against quantum. For the issue on quantum would then become academic. However, in view of the fact that the appeal is against both liability and quantum, I took the initiative to consider the appeal as to quantum as well.

I allowed the appeal in respect of the awards for:

(a) Fracture of tibia and 2cm shortening;

(b) Medical expenses of RM2,849; and

(c) Loss of earning for two years.

But I confirmed the rest of the awards.

I shall now explain why I allowed the appeal in respect of (a), (b) and (c) above.

Fracture Of Tibia And 2 cm Shortening.

The appellant/defendant had appealed against the award of the learned sessions court in respect of this item. The learned sessions court judge had made an award of RM20,000. But no reason was given for making such an award. Presumably this award of RM20,000 was based on *Shuib bin Awang v. Abdul Manan bin Abdul Latif* [1992] 3 CLJ 1558; [1992] 1 CLJ (Rep) 623 because this case was cited by the counsel for the plaintiff before the sessions court. In this case cited, the High Court made the following award:

> (3) Untuk kepatahan tulang betis kiri (fracture left tibia with 2 cm shortening) $18,000.

Under normal circumstances, I would have no qualms in following *Shuib bin Awang* and accepting the award of RM20,000 for such an injury. But in the present case there is an important consideration to be taken into account. The plaintiff, after the accident, was first admitted to a Government hospital, the Alor Setar Hospital, but he refused operative treatment and took an AOR (at own risk) discharge on 21 March 1994. After the discharge he did not immediately seek treatment at another hospital but sought kampung treatment. Only on 27 June 1994 did he go and was examined at a private hospital, the Pusat Pakar Utara ("PPU"). On 10 July 1994 he was operated at that hospital (PPU) for the leg injury. After the operation for the fractured tibia, there was a 2cm shortening of the right leg. What is important is that the specialist from PPU who had examined the plaintiff, Dr John Anantham, testified in court that, had the plaintiff underwent the operation at the Alor Setar Hospital, the shortening would be less half inch to one inch. And Dr Low Keng Hong a specialist from a private hospital known as PMC testified that, had the plaintiff

underwent the operation at the Alor Setar Hospital, the shortening would be very minimal or there would be no shortening at all. Thus the 2cm shortening was partly a result of the plaintiff's own doing – delay in getting treatment. It is trite law that a plaintiff is under a duty to mitigate his damages (*Goh Ah Ba v. Mohd Zain bin Sudin* [1986] 2 CLJ 282; [1986] CLJ (Rep) 139). Under the circumstances, I reduced the award to RM17,000.

Medical Expenses Of RM2,849

The learned sessions court judge had ruled that the plaintiff was entitled to be compensated for the medical expenses of RM2,849 incurred by him at the private hospital, PPU. I have set aside this award. Since the PPU is a private hospital, and the plaintiff had no valid reason to discharge himself from the government hospital in Alor Setar, on the authority of *Harcharan Singh a/l Saudagar Singh v. Hassan b Ariffin* [1990] 2 CLJ 393; [1990] 2 CLJ (Rep) 99 (I prefer the decision in *Harcharan Singh* although I am aware of *Chong Kam Siong v. Herman bin Baharuddin* [1995] 2 CLJ 413) I would have awarded the plaintiff one third of the amount of medical expenses incurred (whatever the amount might have been), had the plaintiff sought immediate treatment at that hospital (PPU) upon discharging himself (against doctor's advice) from the Alor Setar Hospital. However, in the case before me, upon discharging from the Government hospital, the plaintiff did not seek immediate treatment from the PPU. He first sought kampung treatment. There is no evidence regarding the suitability or effectiveness of such treatment. As has been pointed earlier, he went to the PPU for treatment only in June, that is to say, some three months later. As revealed by the evidence of Dr John Anantham and Dr Low, by then the injury had become serious. Again, the principle here is that a plaintiff is under a duty to mitigate his damages. It is my judgment that, applying the said principle and subject to the "one-third rule", a person like the plaintiff who, against doctor's advice, deliberately delayed treatment for a substantial period, resulting in the deterioration of the condition of his injuries, should not be entitled to claim for medical expenses subsequently incurred at a private hospital, unless he can provide satisfactory evidence to show that the cost of medical treatment that he would have incurred had he sought immediate treatment for the same injury at that hospital would, in any event, have been the same, or even more. In the present case, the plaintiff had failed to adduce such evidence.

Loss Of Earnings For Two Years

The learned sessions court judge had awarded a sum of RM9,600 for loss of earnings. The calculation adopted by the learned sessions court judge is as follows:

> Bagaimanpun saya membenarkan kehilangan pendapatan beliau pada masa lalu pada kadar RM20.00 sehari selama 20 hari bagi sebulan dan kehilangan selama 2 tahun ie, RM9,600.

I have also set aside this award because I think the finding of the learned sessions court judge that the plaintiff was employed at the time of the accident and that he was unable to work for a period of two years by reason of his injuries was against the weight of evidence. First, the plaintiff's oral evidence that he worked with a McDonalds restaurant at "Chow Kit road" was rather vague and unconvincing. He did not say what type of job (e.g. waiter, cashier or kitchen helper) that he was doing; or since when he had been working there. And he did not explain what he meant by "belajar sambil berkerja"? Was it a full time job, a temporary job, a vacation job, or a part-time job? He did not state clearly the address of the restaurant. He only mentioned "Cawangan Chow Kit road". When the plaintiff mentioned "Chow Kit road", was he referring to the "Chow Kit Road" in Kuala Lumpur or (bearing in mind that the trial was in Alor Setar) was he referring to some other Chow Kit Road in Kedah? Further, although he claimed he was working for McDonalds – a well-established company – yet, rather surprisingly, he was not able to substantiate his claim with the necessary documents pertaining to his employment such as a letter of appointment or pay slips. And the plaintiff appears to be rather evasive in his testimony when he was asked to substantiate his claim as to the loss of earnings. In examination-in chief, he said:

> Saya rasa ada rekod tentang gaji saya.

But when cross-examined he said:

> Saya tak pasti sama ada boleh dapat rekod itu daripada MacDonald.

The plaintiff made no effort to explain why he was not sure ("tak pasti") of obtaining the record. In my judgment, the above lame answer should be sufficient to cast a doubt on the credibility of the witness.

Second, there is no clear evidence that the plaintiff was unable to find any form of employment at all by reason of his injuries for the period of two years as reckoned by the learned sessions court judge. The sessions court judge does not explain how he arrived at the two-year period. Perhaps the learned sessions court judge was influenced by the plaintiffs evidence to the effect:

> Selepas kemalangan saya mula berkerja dalam tahun 1996 (bulan 6) - gaji RM375.00 (basic).

With respect, merely from the above evidence one cannot imply that the plaintiff, because of his injuries, was unable to obtain any form of employment at all throughout the period prior to June 1996.

(Appeal against liability allowed with costs; appeal against quantum partially allowed.)